Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

MORTIMER L. GRANT and ALICE M. GRANT,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

M. LESLIE GRANT
ALICE M. GRANT
c/o 2702 Cuesta Road
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(805) 687-9771
Appellants Pro Per

61 pp

QUESTIONS PRESENTED

1. Whether a judgment of contempt is void and actionable under Rule 60(b)(4) when issued in violation of an individual's rights against self-incrimination pursuant to the Fifth Amendment, and contempt proceedings are held without notice to an individual of their right to counsel pursuant to the Sixth Amendment.

More specifically, the first issue is whether the denial of the Sixth Amendment right to counsel during contempt proceedings renders a contempt order void under Rule 60(b)(4), since the proceedings were inconsistent with due process of law.

The second issue is whether a contempt order issued in violation of the Fifth Amendment's guarantee against self-incrimination is void and actionable under Rule 60(b)(4).

The Grants were entitled to their Sixth Amendment right during the contempt proceeding growing out of a civil action, and the District Court erred by implicitly determining that the Grants waived their Sixth Amendment right by failing to raise this issue.

2. Whether the Grants were required to comply with an unlawful order, unlawful because it was issued in violation of the Grants' rights against self-incrimination under the Fifth Amendment.

PARTIES TO THE PROCEEDING

The parties to the proceeding were M. Leslie Grant, Alice M. Grant, and the United States of America.

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OPINIONS BELOW

The opinion of the Ninth Circuit sought to be reviewed is ***M. Leslie Grant and Alice M. Grant v. United States***, Nos. 94-56142 and 94-56144 (9th Cir., March 9, 1995), an unpublished opinion. The district court opinions of the same name, Nos. CV 91-4456 JGD and CV 91-4457 JDG (C.D.Calif., June 29, 1994; September 24, 1992), unpublished opinions. These opinions are reprinted in the accompanying Appendix.

JURISDICTION

The opinion of the court of appeals in this case was filed on March 9, 1995. Petitioners' timely Petition for Rehearing was denied on June 2, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case concerns the Fifth and Sixth Amendments of the United States Constitution, and Rule 60(b)(4) of the Federal Rules of Civil Procedure, which are reprinted in Appendix E.

STATEMENT OF THE CASE

A. Introduction.

The Internal Revenue Service served two summonses on Alice M. Grant and Mortimer L. Grant (hereinafter "the Grants") on July 24, 1990. The summonses sought documents and testimony concerning the purported tax liability of the Grants for the period beginning January 1, 1975 through December 31, 1988. The documents sought in each summons were the same, and requested the Grants appearance on August 8, 1990.

The Grants appeared at the time and place commanded by the summonses on August 8, 1990, and they recorded the proceedings. This proceeding was subsequently transcribed and placed on record with the trial court.

Revenue Agent Edward Finley stated precisely why the Grants were being investigated and what evidence he was seeking:

> FINLEY: ... This audit involves Mr. Grant, Mrs. Grant's failure to file their personal income tax returns.
>
> * * *
>
> FINLEY: My audit has nothing to do with what's on the transcript, that there are various reasons why that could have been put on the transcript and this investigation involves their failure to file income tax returns.
>
> * * *
>
> FINLEY: No, it doesn't. What the summons requires is income, that is, bookkeeping records for Mr. Grant's civil engineering practice and information on partnerships in which he was active.
>
> * * *
>
> FINLEY: ... It says all bookkeeping records used in your engineering business to record receipt of income and expenses for the time period beginning January 1, 1975 up to and including Dec. 31, 1989 and it goes down to list the specific records.

The United States filed petitions in District Court to enforce the subject summonses. The District Court issued show cause orders against the Grants, and a hearing was held to show cause why the Grants should not be compelled to comply with the subject summonses. The Court granted the petitions of the United States. The Court ordered respondents to appear before Revenue Agent Edward Finley on November 19, 1991, and at that time comply with the subject summonses.

The Grants appeared on the date and time specified by the Court before Agent Finley. The Grants recorded the meeting and subsequently transcribed the tape. It is self-evident from the transcript of the proceedings that the Grants fully complied with the Court's Order:

> M. GRANT: Well, let's back off on that. Before we answer anything, can any of this information that you're asking me be used in a criminal action in a court of law?
>
> FINLEY: There is no criminal action pending against

you that I'm aware of.

M. GRANT: That wasn't my question.

FINLEY: I'm not a lawyer. I wouldn't be able to say whether there can be or can't be.

* * *

FINLEY: The only forum where that issue can be resolved is the District Court.

M. GRANT: Yeah, but the questions weren't asked of me at the District Court.

FINLEY: But it's not a question to be asked, it's an argument to be raised in your pleadings before the judge. It's a bar to the enforcement of the summons. You're asking and I'm not a lawyer and I don't have the legal authority to pass on these matters.

FINLEY: See, at this point the judge has ordered you to provide the records.

M. GRANT: What he's ordered me to do is comply with the summons. He hasn't gone beyond that. And so I'm complying with the summons.

FINLEY: But you haven't provided your records.

M. GRANT: Well, you just started this thing, right now. I understand that the Internal Revenue Manual 9900, Section 287.41 states: A taxpayer must make the appearance after which he may refuse on constitutional grounds, Fourth and Fifth, to show records....

* * *

M. GRANT: ...So I've got a question. I think you're kind of, uh, weaseling, or whatever you want to call it, waffling on this business of whether this information you're asking me can be used in a criminal action.

FINLEY: I'm just puzzled why you're raising it here and not before the judge.

M. GRANT: Let's just stick to ... when we're doing it here and now. So why is it .... I've asked you a question there: can it be used in a criminal action? In your vast experience in the Internal Revenue Service, I'm sure you have some experience on this.

* * *

A. GRANT: The court can't order him or us to waive any of our Fifth Amendment rights.

FINLEY: There are numerous cases where that was not an argument which was accepted. The only way that's accepted is if there's a criminal investigation ongoing.

* * *

A. GRANT: Could you provide immunity for Mr. Grant and myself?

FINLEY: I don't have the authority to do that.

M. GRANT: Okay, can you get the authority?

FINLEY: I don't know of any mechanism where that could be granted.

* * *

M. GRANT: For the record, let me bring up one other thing. I'm not refusing to produce the documents because it's never been established that these documents exist or they don't exist. I'm NOT refusing to produce them. There is no refusal here. I gave you answer for everything that you've asked.

FINLEY: I just wanted to get this one question on the tape. Mrs. Grant, have you brought any of the records that are listed on the summons?

A. GRANT: I invoke the Fifth and decline to identify whether or not such documents exist or whether they are in my control on the grounds that this information may provide a link or a clue in a chain of evidence in a criminal action which may be used against me.

As is readily apparent from the November 19th transcript, the Grants appeared as ordered by the Court and fully complied with the Order by selectively asserting their constitutional rights against self-incrimination.

Nevertheless, the United States filed a motion to hold the Grants in ***civil*** (sic) contempt due to their alleged failure to comply with the Court's Order. The United States acknowledged that the Grants did appear at the offices of the Internal Revenue Service on

November 19, 1991, as required by the Court's Order. The Government also admitted that the Grants asserted their Fifth Amendment right at the administrative hearing. Agent Finley's declaration testimony was that the Grants asserted their Fifth Amendment rights at the hearing. At the hearing on those motions, the District Court warned the Grants that "they would be subject to incarceration for failure to comply with the Court's order." The Grants were neither advised of their right to counsel nor were they appointed counsel at said hearing.

Notwithstanding the above facts, the United States in bad faith again moved the District Court to find the Grants in "civil" contempt for the exercise of their constitutional rights when they asserted their claims against self-incrimination. Although the Government's pleadings alleged civil contempt and cited Rule 70,[1] it clearly asked the Court that "respondent[s] be incarcerated until [they] purge[] [themselves] of [their] contempts and compl[y] with the Court's order enforcing the Internal Revenue Service summons." The Government expressly requested sanctions under 18 U.S.C. Section 401 and 401(3), which provides in pertinent part:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as ... [d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command.

The United States' motion for contempt clearly invoked the Grants' absolute rights under the Sixth Amendment. The Government's second series of motions to hold the Grants in contempt were heard on September 14, 1992. The Grants were neither advised of their right to counsel nor was counsel appointed to represent them. The District Court granted the United States' motions, and specifically cited 18 U.S.C. Section 401(3), which provides that "[a] court of

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[1] The proceeding under Rule 70, Fed.R.Civ.P., was improper. The United States should have proceeded pursuant to 28 U.S.C. Section 1826.

the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as *** [d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command." There simply can be no doubt that the District Court could not conduct a contempt proceeding without affording them counsel, since the Grants were facing incarceration. The Court ordered the Grants to pay the United States $500 in costs and attorneys' fees and $150 per person per day, until they fully complied with the order enforcing the summons, but did not incarcerate the Grants at that time.

B. Procedural History.

On August 19, 1991, the United States filed petitions in District Court to enforce the subject summonses, pursuant to the provisions of 26 U.S.C. Section 7604. The District Court issued show cause orders against the Grants on August 30 and September 16, 1991. A hearing was held on October 28, 1991, to show cause why the Grants should not be compelled to comply with the subject summonses, and the Court granted the petitions of the United States. The Court ordered respondents to appear before Revenue Agent Edward Finley on November 19, 1991, and at that time comply with the subject summonses. The Court's Order was entered on October 31, 1991.

On March 19, 1992, the United States filed a motion to hold the Grants in ***civil*** (sic) contempt due to their alleged failure to comply with the Court's order entered on October 31, 1991. The Government acknowledged that the Grants did appear at the offices of the Internal Revenue Service on November 19, 1991, as required by the Court's Order. The Government also admitted that the Grants asserted their Fifth Amendment right at the administrative hearing. Agent Finley's declaration testimony was that the Grants asserted their Fifth Amendment rights at the hearing. At the hearing on those motions, the District Court warned the Grants that "they would be subject to incarceration for failure to comply with the Court's order." The Grants were neither advised of their right to counsel nor were they appointed counsel at said hearing.

Notwithstanding the above facts, the United States moved the

District Court to find the Grants in contempt for the exercise of their constitutional rights when they asserted their claims against self-incrimination. Although the Government's pleadings alleged civil contempt, it clearly asked the Court that "respondent[s] be incarcerated until [they] purge[] [themselves] of [their] contempts and compl[y] with the Court's order enforcing the [IRS] summons." The Government requested sanctions under 18 U.S.C. Section 401. The Grants were neither advised of their right to counsel nor was counsel appointed to represent them. The District Court did not address the Grants' Fifth Amendment claims, even though their claims were squarely before the trial court.

The District Court granted the United States' motions in orders filed on September 24, 1992. The District Court specifically cited 18 U.S.C. Section 401(3), which provides for "imprisonment," at the Court's discretion. Although the Court did not incarcerate the Grants at that time, the Court ordered them to pay the United States $500 in costs and attorneys' fees and $150 per person per day, until they fully complied with the order enforcing the summons. The sanctions have accrued to almost $300,000 to the present date. The Grants are also facing certain incarceration on remand of the instant case.

The Grants subsequently appealed ***pro per*** the District Court's contempt order to the Ninth Circuit, addressing issues not related to the instant matter. This Court upheld the District Court's finding of contempt and impositions of sanctions in an unpublished order on February 11, 1994. ***United States v. M. Leslie Grant, et al.***, No. 92-56230 (9th Cir., Feb. 11, 1994). The Grants' petition for rehearing was denied on May 17, 1994.

On June 7, 1994, the Grants filed their Notice of Motion and Motion to Alter, Amend or Vacate Judgment or, in the Alternative, to Purge Respondents of Contempt, pursuant to Rule 60 **(or any other applicable Rule)** of the Federal Rules of Civil Procedure. The Grants argued that the contempt order was inconsistent with due process of law and therefore void and actionable under Rule 60(b)(4), (b)(5) and (b)(6), or any other applicable rule. The contempt order is void because they were denied counsel under the Sixth Amendment and their right against self-incrimination under

the Fifth Amendment.

The Grants also advanced the argument that the United States is not an injured party in the instant matter, nor can the Government be injured, where the Constitution bars the very conduct the Government asserts injured it. Therefore, the Government did not have standing to initiate civil contempt proceedings against the Grants for the exercise of constitutional rights pursuant to Rule 70, Fed.R.Civ.P.

The United States responded in opposition to the motion by arguing that: (1) the Grants' Rule 60(b) motion was not timely, (2) the District Court was without subject matter jurisdiction to hear and determine the motion, and (3) the Grants could not assert their Fifth Amendment right since there wasn't a substantial hazard of self-incrimination.

The United States' response neither addressed the Grants' right to counsel issue nor the Government's lack of standing issue. This is most important because it demonstrates that the United States could not argue against the Grants' well established legal positions.

The District Court conducted a hearing on June 27, 1994, and a Minute Order was entered the same date. During this hearing the trial court reminded the Grants that: "On May 19, 1992, the United States filed motions to hold the Grants in civil contempt. At the hearing on those motions, the Court informed the Grants that it had jurisdiction over the contempt proceedings, ***and warned them that they would be subject to incarceration for failure to comply with the Court's order***." The District Court repeated this statement in its more recent Order denying the Grants motion to alter, amend or vacate its judgment entered on June 29, 1994.[2] As is self-evident, the District Court was clearly warning the Grants it will imprison them for continued non-compliance with the judgment of contempt, which the Grants challenged in their Ninth Circuit appeal

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[2] ***In re Grand Jury Proceedings v. Sun Kung Kang***, 468 F.2d 1368, 1369 (9th Cir. 1972) (Threat of imprisonment is the coercion that makes a civil contempt proceeding effective. The civil label does not obscure its penal nature. A witness is entitled to appointed counsel in such a proceeding.); ***United States v. Dinsio***, 468 F.2d 1392 (9th Cir. 1972).

as void.[3] Although the District Court was reluctant to incarcerate the Grants, it appears imminent incarceration is at hand.

The District Court denied the Grants' Rule 60(b) motion. In the June 29, 1994, District Court's Order Denying Respondents' Motion to Alter, Amend or Vacate Judgment or, in the Alternative, to Purge Respondents of Contempt, the Court reasoned that "the Grants are responsible for failing to raise their Fifth and Sixth Amendment arguments during the summons enforcement and contempt proceedings. Thus, to obtain relief under Rule 60(b), they must operate under subsection (b)(1), which contains the one-year limitation period. ... Thus, their new constitutional arguments are time-barred." The Grants appealed the District Court's denial of their Rule 60(b)(4) motion.

The panel's decision denying the Grants' appeal was entered March 9, 1995. ***United States v. Grant***, No.'s 94-56142 and 94-56144 (9th Cir., March 9, 1995). The panel's decision simply buried the Grants' constitutional guarantees, along with the Bill of Rights, ten feet under by effectively reading into the Sixth Amendment an expiration date of one year. The panel concealed this constitutional abrogation by issuing an unpublished opinion, thereby limiting any potential criticism from the legal community.

First, the panel's decision applied the abuse of discretion standard, instead of the proper ***de novo*** standard, by parroting the District Court's decision that they were ***partly to blame*** for not demanding their Sixth Amendment right to counsel. Of course, the panel did not reflect what conduct the Grants were alleged to have committed that shifted the blame to them, thereby secreting the constitutional violations. By improperly placing the blame on the Grants for not demanding counsel, the panel determined the District Court correctly construed their Rule 60(b)(4) motion as being brought under Rule 60(b)(1). In other words, the panel concluded

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[3] It is uncertain what type of contempt the District Court has in store for the Grants; i.e., civil contempt where the Grants are incarcerated until they comply, or criminal contempt as urged by the Government in its motion for contempt, which could involve 26 U.S.C. Sections 7604(b) and 7210, or 18 U.S.C. Section 401.

that Americans are now required to have the requisite knowledge to know when the federal judiciary is intentionally violating the United States Constitution, and if Americans do not catch them in a timely manner, too bad, because the rights are time barred.

To conclude the panel's result-oriented opinion, it determined that motions filed under Rule 60(b)(1) must be filed not more than one year after the judgment, order, or proceeding was entered, and because the Grants' Rule 60(b)(4) motion was filed more than twenty months after the entry of the contempt orders, the Court did not err in denying the motions. Transposing a Rule 60(b)(4) motion into one under Rule 60(b)(1) is tantamount to setting up a strawman and knocking it down. Thus, the panel refused to address the merits of the Grants' appeal that they were denied the most basic of all constitutional rights, which rendered the contempt orders void for violations of due process.

The panel's ruling is equivalent to finding that, after trial, a criminal defendant was estopped from arguing that he was entitled to counsel, because he never demanded same during the proceeding. Such ruling is in direct conflict with several decades of United States Supreme Court precedents.

Pursuant to Rules 35 and 40(a) of the Federal Rules of Appellate Procedure and the corresponding Rules of the Ninth Circuit, the Grants timely petitioned for rehearing, with suggestion for ***en banc*** review. On June 2, 1995, the Ninth Circuit denied the Grants' suggestion for rehearing ***en banc***.

REASONS FOR GRANTING THE WRIT

The Ninth Circut Panel failed to undertake the ***de novo*** inquiry mandated by Rule 60(b)(4) as interpreted by Ninth Circuit precedents. ***Retail Clerks Union v. Freedom Food Center***, 938 F.2d 136, 137 (9th Cir. 1991) (We review ***de novo*** denial of a Rule 60(b)(4) motion to set aside a judgment as void, because the question of the validity of a judgment is a legal one); ***U.S. v. Holtzman***, 762 F.2d 720, 724 (9th Cir. 1985) (same); ***United States v. McConney***, 728 F.2d 1195, 1201 (9th Cir.) (***en banc***), ***cert. denied***, 105 S.Ct. 101 (1984) (same); ***Jones v. Giles***, 741 F.2d 245, 247 (9th Cir. 1984) (same); ***Miller v. Oregon Liquor***

Control Comm'n, 688 F.2d 1222, 1223 (9th Cir. 1982) (same); ***Thos. P. Gonzalez Corp. v. Consejo Nacional de Costa Rica***, 614 F.2d 1247, 1256 (9th Cir. 1980) (same); ***Meadows v. Dominican Republic***, 628 F.Supp. 599 (N.D.Cal. 1986) (same).

In particular, the panel limited its review to an abuse of discretion standard, by concluding that the only provision the Grants could have relied on in bringing their motions was Fed.R.Civ.P. 60(b)(1). Rule 60(b)(1) is inapplicable to the Grants' claim that the District Court's Orders finding them in civil contempt are void, because the District Court acted in a manner inconsistent with due process of law by denying them their Sixth Amendment right to counsel. ***In re Downtown Inv. Club III***, 89 B.R. 59, 63 (9th Cir.BAP 1988); ***In re Center Wholesale, Inc.***, 759 F.2d 1440, 1448 (9th Cir. 1985); ***Winhoven v. United States***, 201 F.2d 174, 175 (9th Cir. 1952) (A judgment may be set aside on voidness grounds under Rule 60(b)(4) for a violation of the due process clause of the Fifth Amendment); ***In re Bestway Product, Inc.***, 151 B.R. 530, 538 (Bkrtcy E.D.Cal. 1993).

The District Court: (1) failed to afford the Grants the ***Argersinger v. Hamlin***, 407 U.S. 25 (1972) protections, and (2) failed to afford them the protections mandated by ***Lassiter v. Department of Social Services of Durham County***, 452 U.S. 18 (1981), which denied them due process, thereby rendering the contempt orders invalid and void. See ***Daigle v. Warner***, 348 F.Supp. 1974 (D.Hawaii 1972) (Whether considered in terms of due process or the Sixth Amendment right to counsel). The ***Argersinger*** and ***Lassiter*** protections required the trial court to (1) advise the Grants of their right to counsel; (2) afford them an opportunity for assistance of counsel both prior to and during the summary contempt proceedings, (3) advise them if indigent, counsel must be provided without cost, and (4) after the above three requirements are satisfied, the Grants may make a knowing and intelligent waiver of their right to counsel. **It is undisputed that the Grants were denied their constitutional protections pursuant to the Fifth and Sixth Amendment**.

Under Ninth Circuit case authority, although the language of Rule 60(b)(4) appears to allow the court discretion, there is no

discretion to refuse vacating a judgment if it is void. ***In re Cossio***, 163 B.R. 150, 154 (9th Cir.BAP 1994). The panel erred by failing to apply Ninth Circuit and Supreme Court precedents directly on point with the instant matter, which required the panel to apply a ***de novo*** standard of review. Contempt orders that are void due to a trial court's failure or refusal to afford contemnors their constitutional safeguards do not become valid after twelve months.

The use of an IRS summons in the instant matter amounts to compelled testimony, the nature of which, if incriminatory, is protected by the Fifth Amendment. In ***Garner v. United States***, the Supreme Court held that, "it cannot be said that taxpayers are 'volunteers' when they file their tax returns. The Government compels the filing of a return much as it compels, for example, the appearance of a 'witness' before a grand jury." 424 U.S. 648, 652 (1976). Not only did the IRS summons direct the Grants to appear before the IRS, the Court ordered them to show cause why the summons should not be enforced and ordered them to appear with the summoned documents. This is all compelled testimony. The fact they are not in a custodial setting or under indictment is beside the point. They are being forced to testify or produce certain records which, if in existence, could be incriminatory. They were entitled to court-appointed counsel when they were directed by the District Court to "answer official questions put to [them] in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate [them] in future criminal proceedings." ***Lefkowitz v. Turley***, 414 U.S. 70, 77 (1973). That time occurred when the Court issued the Order to Show Cause entered on October 31, 1991.

In ***Maine v. Moulton***, 474 U.S. 159 (1985), ***Argersinger v. Hamlin***, ***supra***, and ***Gideon v. Wainwright***, 372 U.S. 335 (1963), the Supreme Court has found it necessary to restate Justice Sutherland's opinion in ***Powell v. Alabama***, 287 U.S. 45 (1932), on the issue of one's right to counsel.

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has

> small and sometimes no skill in the science of the law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every stage of the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. ***Powell***, 287 U.S. at 68-69.

This is precisely what occurred in the instant matter. The Grants have a perfect defense, their absolute right against self-incrimination. But without "the guiding hand of counsel at every stage of the proceedings," the Grants were found guilty of contempt due to their lack of "skill and knowledge" to adequately advance their defense. When a defendant has been denied due process, his guilt or innocence is irrelevant; he has not been tried by civilized standards, and cannot be punished until he has been. ***Henderson v. Bannan***, 256 F.2d 363, 388 (1958). The denial of the Grants' right to counsel abridged their right to a hearing. ***Powell***, ***supra***.

"Civil" IRS investigations have been recognized as having the potential for leading into criminal prosecutions. ***United States v. Sharp***, 920 F.2d 1167, 1170 (4th Cir. 1990). As in the instant case, proceedings instituted by the IRS pursuant to its authority to investigate tax cases generally begin as civil enforcement actions. However, the Supreme Court has stated although: "It is true that a 'routine tax investigation' may be initiated for the purpose of a civil action rather than criminal prosecution ... tax investigations frequently lead to criminal prosecutions, just as the one did here." ***Mathis v. United States***, 391 U.S. 1, 2, 6 (1968). See also ***Kastigar v. United States***, 406 U.S. 441 (1972); ***Curcio v. United States***, 354 U.S. 118, 125 (1957); ***United States v. Neff***, 615 F.2d

1235, 1239 (9th Cir.), ***cert. denied***, 447 U.S. 925 (1980); ***United States v. Cates***, 686 F.Supp. 1185 (D.Md. 1988). "This result is inevitable because Congress has created a law enforcement system in which criminal and civil elements are inherently intertwined.... The legislative history of the [Internal Revenue] Code supports the conclusion that Congress intended to design a system with interrelated criminal and civil elements." ***United States v. LaSalle National Bank***, 437 U.S. 298, 309-10 (1978).

In ***United States v. Rylander***, 460 U.S. 752 (1983), Justice Rehnquist held a proceeding to enforce an IRS summons is an adversary proceeding in which the defendant may contest the summons "'on any appropriate ground.'" ***Rylander***, 460 U.S. at 757 (quoting ***Reisman v. Caplin***, 375 U.S. 440, 449 (1964)). Said adversarial proceeding entitles an indigent individual to court-appointed counsel. ***United States v. Sun Kung Kang***, 468 F.2d 1368 (9th Cir. 1972); ***United States v. Anderson***, 553 F.2d 1154 (8th Cir. 1977); ***Ridgeway***, 720 F.2d at 1415; ***In re Kilgo***, 484 F.2d 1215 (4th Cir. 1973); ***In re Di Bella***, 518 F.2d 955 (2d Cir. 1975).

Because of the adversarial nature of an enforcement proceeding on the IRS summons, the realization that such "civil" investigations truly are "criminal or quasi-criminal," and that they "frequently lead to criminal prosecutions," counsel should have been appointed for the Grants prior to or at the show cause hearing of October 28, 1991. The Supreme Court has recognized that an individual's right to counsel includes the proceedings prior to a trial: "...to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself. Recognizing that the right to the assistance of counsel ***is shaped by the need for the assistance of counsel***, we have found that the right attaches at earlier, 'critical' stages in the criminal justice process 'where the results might well settle the accused's fate and reduce the trial itself to a mere formality.'" ***Maine v. Moulton***, ***supra***.

Assuming ***arguendo***, that the anticipated admissions sought by the Government pursuant to the District Court's order enforcing the IRS summons do in fact exist, it goes without saying that such a response by the Grants would make a subsequent prosecution for

failure to file income tax returns, tax evasion, failure to pay a tax, etc., for the years in question a "mere formality." The basis for such a prosecution and conviction would be the Grants' own incriminations, again assuming such testimony and/or documentation exists.

> "Title 26, [Section] 7201 of the United States Code provides that any person 'who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof' shall be guilty of a felony. Under 26 U.S.C. [Section] 7203, 'any person required under this title ... or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information ... shall be guilty of a misdemeanor.'" ***Cheek v. United States***, 111 S.Ct. at 606.

In the case of ***U.S. v. Sharp***, ***supra***, the trial court's denial of Sharp's Fifth Amendment claim was reversed by the Fourth Circuit. The ***Sharp*** Court ruled that the incriminating nature of the information sought was evident.

> Here, the incriminating nature of the information sought from Sharp was evident from the very questions asked under the circumstances of their asking. Sharp was asked to provide information directly relating to his income and his knowledge of it for the years in which he was under investigation for failing to file returns. Willfulness is an essential element of the criminal offense of failing to file income tax returns. 26 U.S.C. [Section] 7203. Hence, it is evident that the information sought would "furnish a link in the chain of evidence that could lead to prosecution," and that suffices. ***See Hoffman***, 341 U.S. at 486, 71 S.Ct. at 818. ***Sharp***, 920 F.2d at 1171.

The record on file in this case clearly shows that it is the

Grants who are under investigation by the IRS, and that the documents and testimony pursuant to the subject summonses pertain to them. The United States' Petition(s) to Enforce Internal Revenue Service Summons[es] filed with the District Court, state that: "It is necessary to obtain the testimony, records, and other data sought by the summons so that the Internal Revenue Service can properly pursue and complete its investigation."

The United States' petition(s) also allege criminal conduct on behalf of the Grants: "The Internal Revenue Service is, and at all relevant times was, conducting an investigation with respect to the tax liability of the taxpayer[s] for the period or years described on the summons, for which respondent(s) ***failed to file*** individual income tax returns."

The Grants, unaided by counsel, were grasping for the correct method to assert their constitutional rights secured by the United States Constitution--specifically the Fifth Amendment. Although the Grants have renounced the IRS' procedures as illegal and violative of their constitutional rights, the critical issue they were attempting to advance with the trial court is whether they can assert their Fifth Amendment right not to provide protected testimony or produce protected documents.

The Internal Revenue Code makes criminal offenses, among numerous others, for willful attempt to evade or defeat the imposition or payment of tax or willful failure to make a return, pay a tax or supply information at times required by law or regulations. 26 U.S.C. Sections 7201, 7203, 7206.[4] The Grants have reasonable grounds to fear that the act of producing the summoned documents, without admitting or denying the documents exist, would authenticate or identify the documents as those

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[4] "An assumption sufficiently justified, indeed compelled, by the existence of the government's general constitutional obligation faithfully to execute its criminal (as other) laws, U.S. Const. Art. II, [Sec.] 3, principally by prosecuting (subject of course to prosecutorial discretion) all those whose commission of crimes it has sufficient evidence to prove. Certainly an apprehension that in a particular case that general obligation will be carried out could ***not*** be thought unreasonable." ***U.S. v. Sharp***, 920 F.2d 1167, 1171 n. 2 (4th Cir. 1990).

demanded by the summons(es), acknowledge their existence, and establish their possession of them. All or at least some of these factors must be established as a foundation to the admission of the documents into evidence at any possible criminal trial.

The failure of the District Court to appoint and/or even advise the Grants of their right to counsel prior to the initiation of any contempt proceeding is a violation of their Sixth Amendment right. A Court appointed counsel would have resulted in a more lucid assertion of their Fifth Amendment protections. Prior to the contempt hearing, the Grants were required to appear to give testimony and produce records. This was first accomplished by the IRS' summonses, and secondly the District Court's order enforcing said summonses. The Grants, without counsel, raised numerous rights and objections to the IRS procedure, but the District Court never touched upon their concerns about self-incrimination. Apparently, the District Court impliedly found they did not artfully assert their Fifth Amendment right, but it is well established in American Jurisprudence that:

> [F]undamental rights do not hang by the tenuous thread of a layman's knowledge of the niceties of law. It is sufficient if it appears that he is attempting to assert his constitutional privilege. The plea, rather than the form in which it is asserted, determines whether the privilege against self-incrimination is to be upheld. ***In re Friedman***, 104 F.Supp. 419, 421 (S.D.N.Y. 1952).

Nevertheless, the District Court repeatedly refused to recognize the Grants' invocation of their Fifth Amendment right against self-incrimination and their Sixth Amendment right to counsel throughout the entirety of the record. The Grants presented themselves for questioning before the Internal Revenue Service, and as to each question elected to raise or not to raise their Fifth Amendment defense. ***United States v. Bell***, 448 F.2d 40, 42 (9th Cir. 1980). See also ***United States v. Rendahl***, 746 F.2d 553, 555 (9th Cir. 1984) (citing ***United States v. Roundtree***, 420 F.2d 845, 852 (5th Cir. 1969)); ***Steinert v. United States***, 571 F.2d 1105

(9th Cir. 1978)). Referencing the ***Roundtree*** Court, the Ninth Circuit in ***Bell*** held, "Appellant must present himself for questioning, and as to each question elect to raise or not to raise the defense." ***Bell***, at 42. It is certain that the Grants complied with the procedure established in the Ninth Circuit during their second interview with IRS Agent Finley on November 19, 1991.

The right to counsel exists if the litigant may lose his physical liberty if he loses the litigation. ***United States v. McAnlis***, 721 F.2d 334, 337 (11th Cir. 1983).

> "It would be absurd to distinguish criminal and civil incarceration; from the perspective of the person incarcerated, the jail is just as bleak no matter which label is used. In addition, the line between criminal and civil contempt is a fine one, and is rarely as clear as the state would have us believe. The right to counsel, ***as an aspect of due process***, turns not on whether a proceeding may be characterized as 'criminal' or 'civil,' but on whether the proceeding may result in a deprivation of liberty. ***Ridgeway***, 720 F.2d at 1413; ***Walker v. McLain***, 768 F.2d 1181, 1183 (10th Cir. 1985).

Therefore, the error of the Ninth Circuit is readily apparent. With due deference to the panel, the Grants' right to counsel is an aspect of due process, and the District Court's failure to advise and appoint counsel to represent them during the contempt proceedings renders the contempt orders void and actionable under Rule 60(b)(4).

ARGUMENT

I. WHETHER A JUDGMENT OF CONTEMPT IS VOID AND ACTIONABLE UNDER RULE 60(B)(4) WHEN ISSUED IN VIOLATION OF AN INDIVIDUAL'S RIGHTS AGAINST SELF-INCRIMINATION PURSUANT TO THE FIFTH AMENDMENT, AND CONTEMPT PROCEEDINGS ARE HELD WITHOUT NOTICE TO AN INDIVIDUAL OF THEIR RIGHT TO COUNSEL PURSUANT TO THE SIXTH AMENDMENT

On page 2 of the panel's decision, it stated that the standard of review of a Rule 60(b) motion is for abuse of discretion, and it brings up only the denial of the motion for review, not the merits of the underlying judgment. The panel acknowledged that the Grants brought their motion pursuant to Rule 60(b)(4), but determined that they failed to show that the District Court's orders finding them in contempt were void. The panel reached this conclusion by finding that "the Grants were partly to blame for the delay in bringing their motions," and "the district court correctly construed the Grants' motions as being brought under Rule 60(b)(1)." Only by sanctioning unconstitutional conduct can the panel deny the Grants' protection under the Bill of Rights.

First, the Grants are somewhat bewildered that a denial of their Sixth Amendment right to counsel could be construed by the panel as a failure to show that the District Court's orders finding them in contempt were void. "Despite the uncertain meaning of void, it is accepted that if the miscarriage is sufficiently egregious, Rule 60(b)(4) applies." ***Bestway Products***, 151 B.R. at 538; ***Tsafaroff v. Taylor***, 884 F.2d 478, 481-82 (9th Cir. 1989); ***Center Wholesale***, 759 F.2d at 1448-51.[5] "Either the judgment is void or

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[5] Cases that make generalizations about applying Rule 60 in "extraordinary circumstances" usually are not focused on Rules 60(a) and 60(b)(4). ***Boyertown Data Systems, Inc. v. Tucci***, 81 B.R. 320 (Bankr.E.D.Pa. 1988). Neither Rule 60(a) nor Rule 60(b)(4) requires extraordinary circumstances. A mistake is a mistake, and void is void. ***In re Bestway Products, Inc.***, 151 B.R. at 534 n. 13.

it is valid." ***Meadows***, 628 F.Supp. at 603; ***Jones v. Giles***, 741 F.2d 245, 247 (9th Cir. 1984) (A district judge has no discretion in determining whether a judgment is void; it either is or it is not). The federal courts have repeatedly ruled that the denial of counsel is a violation of due process, which renders a judgment void. It is also generally acknowledged that the touchstones of due process are notice and adequacy of representation. ***Silber v. Mabon***, 957 F.2d 697, 700 n. 3 (9th Cir. 1992). The denial of counsel in a contempt proceeding is a due process violation rendering the contempt orders void.

Some courts have ruled that a litigant, represented by an incompetent or sloppy counsel, is entitled to relief under Rule 60(b). ***Ireco Industries***, 2 B.R. 76 (Bkrtcy Oregon 1969); ***King v. Mordowanec***, 46 F.R.D. 474 (D.C.R.I. 1969) (treating "gross" negligence by counsel as constituting special circumstances taking the case out of clause (1) and affording relief under clause (6)).

In ***Klapprott v. United States***, 335 U.S. 601 (1943), the Supreme Court held that it is well established that the power vested in the courts under Rule 60(b)(6) is sufficient to enable them to vacate judgments whenever such action is appropriate to accomplish justice. A litigant is entitled to a fair hearing which presupposes an opportunity to present all the facts available in support of his position. It is true that most decisions interpreting Rule 60 have been concerned with cases involving default judgments. However, there is little difference between a judgment rendered without a hearing and one rendered after a hearing in which counsel for one of the litigants is in such condition as to not have the ability to properly represent his client's interests. ***Credimas' Estate***, 14 F.R.D. 15 (1953).

In the instant matter, the Grants were wholly unrepresented by counsel, and the District Court, affirmed by the panel's decision, blamed the Grants for such failure. In ***Daigle v. Warner***, 348 F.Supp. 1074 (D.Hawaii 1972), the Government advanced the argument that because petitioner could have objected to the summary court-martial, and thereby received protections provided by a general or summary court, his constitutional rights were not violated. The court disagreed and applied the ***Argersinger***

protections. The court found that ***Argersinger*** protections demand that an accused is (1) advised of his right to counsel, (2) afforded an opportunity for assistance of counsel, prior to and during the summary proceeding, (3) advised that if indigent, counsel must be provided without cost, and (4) after the above three requirements are satisfied, the accused may make a knowing and intelligent waiver of his right to counsel. ***Id***. at 1078.

The right to counsel does not depend upon whether the proceeding is characterized as "criminal" or "civil." The Supreme Court has said: "This right extends to every case in which the litigant ***may be deprived of his personal liberty if he loses***." ***Lassiter v. Department of Social Services***, 452 U.S. at 25. "But were the [civil v. criminal] label important, the [federal] courts have long considered contempt proceedings growing out of civil actions criminal or quasi-criminal in nature." (Cites omitted). ***Ridgeway***, 720 F.2d at 1413.

The Second Circuit eloquently discussed one's right to counsel in a civil contempt proceeding where one invokes the Fifth Amendment right against self-incrimination in ***U.S. v. Bobart Travel Agency***, 699 F.2d 618 (2d Cir. 1983). Referring to it as presenting "thorny and unsettled issues," the Second Circuit held:

> [T]he hazards of those issues underscore that Bennett [respondent] should not have been denied the assistance of counsel: To guide a client between the Scylla of contempt and the Charybdis of waiving his Fifth Amendment privilege requires not only a lawyer but an astute one. This court flatly held in ***In re Di Bella***, 518 F.2d 955 (2d Cir. 1975), that an individual is entitled to counsel in a civil contempt proceeding under 28 U.S.C. section 1826." ***Bobart***, 699 F.2d at 619-620.

The District Court's ruling, sanitized by the Ninth Circuit panel, that "the Grants are responsible for failing to raise their Fifth and Sixth Amendment arguments during the summons enforcement and contempt proceedings," is contrary to well established precedents and wrong. The Fifth Amendment claim was squarely

before the trial court, but it never addressed the claims. Further, the blame, even in part, cannot be shifted to the Grants for their alleged failure to assert their constitutional protections in order to breath life into the void contempt orders.

An accused contemnor's ***failure to request*** the assistance of counsel ***is not a waiver*** of his constitutional right to the assistance of counsel, ***McNeal v. Culver***, 365 U.S. 109 (1961), and it ***may not be presumed*** from a silent record, even if it shows that the accused pleaded guilty, that he intelligently and understandingly waived his constitutional right to the assistance of counsel. "The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. ***Anything less is not waiver***." ***Carnley v. Cochran***, 369 U.S. 506 (1962); ***Walton v. Arkansas***, 371 U.S. 28 (1962).

The courts have "uniformly recognized the right to appointed counsel in various contempt proceedings, and a contempt proceeding without the ***Argersinger*** protections is contrary to due process. The Supreme Court has held that the ***due process clause*** requires the benefit of counsel for the accused contemnor in constructive contempt cases." ***In re Oliver***, 333 U.S. 257, 275 (1948); ***Cooke v. United States***, 267 U.S. 517, 537 (1925); ***Henkel v. Bradshaw***, 483 F.2d 1386 (9th Cir. 1973) (***due process*** requires counsel for the indigent in contempt cases); ***Ridgeway***, 720 F.2d at 1415.

There is no question that a person may waive the right to counsel and defend against contempt charges ***pro se***. To be valid, however, the waiver of this fundamental constitutional right must be voluntary, knowing and intelligent. ***Sanchez v. Mondragon***, 858 F.2d 1462, 1465 (10th Cir. 1988). Before a defendant proceeds ***pro se***, the District Judge must ensure and establish on the record that defendant "knows what he is doing and [that] his choice is made with eyes open." ***Faretta v. California***, 422 U.S. 806, 835 (quoting ***Adams v. U.S. ex rel. McCann***, 317 U.S. 269, 279 (1942)).

Faretta requires a showing on the record that the defendant who elects to conduct his own defense has some sense of the

magnitude of the undertaking and the hazards inherent in self-representation when he makes the election. The task of ensuring that defendant possesses the requisite understanding falls on the trial judge, who must bear in mind the strong presumption against waiver. ***Von Moltke v. Gillies***, 332 U.S. 708, 723 (1948).

> To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered. ***Von Moltke***, 332 U.S. at 723-24.

The federal courts have reiterated that the factors articulated must be conveyed to the defendant ***by the trial judge*** and ***must appear on the record*** so that appellate review may be conducted without speculation. In other words, the blame cannot be shifted, even partly, to ***pro se*** litigants. The inquiry mandated by the Constitution, as interpreted by the federal courts, must occur at a ***pre***trial hearing, so that if the defendant decides not to waive his right to counsel, he will have a meaningful opportunity to exercise it. ***U.S. v. Padilla***, 819 F.2d 952 (10th Cir. 1987); ***U. S. v. Mitchell***, 788 F.2d 1232, 1235 (7th Cir. 1986); ***U. S. v. Martin***, 790 F.2d 1215, 1218 (5th Cir. 1986).

The record in the instant matter proves that the Grants ***at <u>no</u> time*** were (1) advised of their constitutional right to counsel, (2) afforded an opportunity for assistance of counsel both prior to and during the summary contempt proceedings, (3) advised if indigent, counsel must be provided without cost, and (4) after the above three requirements are satisfied, that the Grants could make a knowing and intelligent waiver of their right to counsel. At ***<u>no</u> time*** did the Judge caution the Grants as to the pitfalls of

representing themselves nor did the Judge even address their right to counsel. The District Judge should have appointed counsel to represent the Grants, with the possible understanding they were to pay back the costs of representation, if they did not qualify as indigents. The Grants were denied their Sixth Amendment right to counsel during the contempt proceedings, which denied them due process of law, and the contempt orders are therefore void.[6]

All that the Grants are requesting is an opportunity, assisted by competent legal counsel, to present testimony to the court supporting their positions. They have not been afforded this constitutional guarantee. The trial court's and panel's favored interpretation, and unconstitutional blame directed at the Grants, will (1) permanently bar them from any defense, (2) impose a $300,000 monetary sanction, and (3) put them behind bars.

The posture of this case is that the Grants can now be summarily incarcerated for contempt. Even a belated appointment of counsel at this time, prior to incarceration, is a "mere formality." ***Maine v. Moulton***, 474 U.S. at 170. "The belated appointment of counsel now ... [can] not retroactively validate the proceedings. Due process cannot be accorded ***nunc pro tunc*** to validate a period of imprisonment imposed without proper proceedings." ***Ridgeway*** at 1412. The appointment of counsel at this late date (indeed--the Constitution itself) has no meaning unless this Court orders the trial court to allow for the IRS' summons enforcement hearing to be relitigated.

The Ninth Circuit has repeatedly ruled that Rule 60(b)(4) is the correct avenue to challenge a void judgment, the one year statute does not apply, and the motion need only be brought within a

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[6] In ***McNeal v. Culver***, 365 U.S. 109 (1961), it was held that if the allegations of a state prisoner's petition for habeas corpus were true, he was ***denied due process*** when a state court before which he was tried for assault to murder in the first degree, a noncapital offense, refused his request that counsel be appointed to represent him. See also ***Chandler v. Fretag***, 348 U.S. 3 (1954); ***Hudson v. North Carolina***, 363 U.S. 697 (1960); ***Reynolds v. Cochran***, 365 U.S. 525 (1961); ***White v. Maryland***, 373 U.S. 59 (1963); ***Douglas v. California***, 372 U.S. 353 (1963).

reasonable time. "[I]f a judgment is void, a motion to set it aside may be brought ***at any time***." ***Center Wholesale***, 759 F.2d at 1448; ***U.S. v. 87 Skyline Terrace***, 26 F.3d 923 (9th Cir. 1994); ***In re Golob***, 146 B.R. 566, 569 (9th Cir.BAP 1992); ***Wages v. IRS***, 915 F.2d 1230, 1234 (9th Cir. 1990); ***Billingsley v. C.I.R.***, 868 F.2d 1081, 1085 (9th Cir. 1989); ***Zumbrum***, 88 B.R. 250, 252 (9th Cir.BAP 1988); ***Meadows***, 817 F.2d at 521; ***In re Lovitt***, 757 F.2d 1035, 1040 (9th Cir. 1985); ***Watts v. Pinckney***, 752 F.2d 406, 409 (9th Cir. 1985); ***Bookout v. Beck***, 354 F.2d 823, 825 (9th Cir. 1965). A judgment is void "if the court acted in a manner inconsistent with due process." ***Tomlin v. McDaniel***, 865 F.2d 209, 210 (9th Cir. 1989); ***Downtown Inv. Club III***, 89 B.R. at 62-63; ***Center Wholesale***, 759 F.2d at 1448; ***U.S. v. 1982 Sanger 24' Spectra Boat***, 738 F.2d 1043, 1046 (9th Cir. 1984); ***Dredge Corp. v. Penny***, 338 F.2d 456, 462 & n. 14 (9th Cir. 1964) (failure to provide notice is a serious procedural irregularity which justifies relief from the judgment under Rule 60(b)(4)); ***Winhoven***, 201 F.2d at 175. Due process requires that individualized notice be given before rights can be affected. ***In re Blumer***, 66 B.R. 109 (9th Cir.BAP 1986), ***aff'd***, 826 F.2d 1069 (9th Cir. 1987).[7]

It should be beyond discussion that the Grants' Rule 60(b)(4) motion challenged the District Court's contempt orders as void because they were issued in a manner inconsistent with due process, which required the panel to apply the ***de novo*** standard of review. ***Retail Clerks Union***, 938 F.2d at 137; ***Holtzman***, 762 F.2d at 724; ***McConney***, 728 F.2d at 1201 (***en banc***); ***Jones***, 741 F.2d at 247; ***Miller***, 688 F.2d at 1223; ***Thos. P. Gonzalez Corp.***, 614 F.2d at 1256; ***Meadows***, 628 F.Supp. 599 (N.D.Cal. 1986).

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[7] See also ***Gould v. Mut. Life Ins. Co. of New York***, 790 F.2d 769, 771 (9th Cir. 1986) (Review of a Rule 60(b) motion may encompass a claim that the district court acted in excess of its jurisdiction); ***Cel-A-Pak v. California Agr. Labor Relations Board***, 680 F.2d 664, 668 (9th Cir. 1982); ***United States v. Russell***, 578 F.2d 806, 807 (9th Cir. 1978).

II. THE GRANTS WERE NOT REQUIRED TO COMPLY WITH AN UNLAWFUL ORDER -- UNLAWFUL BECAUSE IT WAS ISSUED IN VIOLATION OF THE GRANTS' RIGHTS AGAINST SELF-INCRIMINATION UNDER THE FIFTH AMENDMENT

The Grants are held in continuing contempt for their failure to obey the District Court's order enforcing the IRS' summonses. However, said order is unlawful due to its violation of the Fifth Amendment right against self-incrimination, and because no factual determination has been made that the summoned documents do, in fact, exist.

It is unquestionable that the Grants were entitled to their right against self-incrimination. Assuming ***arguendo*** that documents the IRS' summonses are seeking do exist, and the District Court has properly made a finding as to their existence, the act of producing them is protected even though the documents themselves may not be protected by the Fifth Amendment. ***United States v. Doe***, 465 U.S. 605, 612 (1984); ***Fisher v. United States***, 425 U.S. 391, 410 (1976); ***United States v. Davis***, 636 F.2d 1028, 1041 (5th Cir. 1981). In affirming ***Doe***, the Supreme Court refused to overturn the district court's findings that: "With few exceptions, enforcement of the subpoenas would compel [respondent] to admit that the records exist, that they are in his possession, and that they are authentic. These communications, if made under compulsion of a court decree, would violate [respondent's] Fifth Amendment rights." ***Id.***, 465 U.S. at 613 n. 11.

The Eleventh Circuit recently addressed this very issue in ***U.S. v. Argomaniz***, 925 F.2d 1349 (11th Cir. 1991).

> By producing documents in compliance with the IRS summons, Argomaniz would be establishing the existence and authenticity of the documents listed in the summons, as well as verifying that these documents were in his possession. (Cite omitted). He would actually be informing the government that he had income in the years

> in question yet failed to file income tax returns. This act of production would be sufficiently testimonial and incriminating to activate Argomaniz's fifth amendment privilege. ***Argomaniz***, 925 F.2d at 1356.

The Fifth Amendment also provides the Grants with protection against compelled testimony. The Fifth Amendment has been held to assure individuals the option or privilege of refusing to answer potentially incriminating questions when compelled to appear before an administrative agency. ***Smith v. United States***, 337 U.S. 137 (1949). The privilege protects against incriminating testimony, and what may incriminate is not always easily determined. Not only the admission of a crime itself but testimony carrying the risk of incrimination is protectable by a privilege claim. The Supreme Court in the case of ***Hoffman v. United States***, ***supra***, has described the scope of the privilege this way:

> The privilege afforded ***not only*** extends to answers that would in themselves support a conviction ... but likewise embraces those which would ***furnish a link in the chain of evidence*** needed to prosecute the claimant... To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." ***Hoffman***, 341 U.S. at 486-487.

Applying the ***Hoffman*** Court's description of the privilege's scope, it has been held that a summons seeking financial information from a taxpayer in order to collect her civil tax liability was not enforceable over her privilege claim because the answers might provide a link in the chain of evidence needed to prosecute. ***United States v. Hayworth***, 386 F.Supp. 1099 (S.D.N.Y. 1975). See also ***United States v. Harper***, 397 F.Supp. 983 (E.D.Pa. 1975) (revenue agent summons; privilege upheld even though Service denied any intention of proceeding criminally). ***United Liquor Co. v. Gard***, 81-2 USTC 9613 (D.Ariz. 1981) (civil action under IRC

7217 for disclosure of tax information, reporter refused to disclose source of information on self-incrimination grounds; held, disclosure might have been link in chain of evidence needed to prosecute under IRC 7217); ***United States v. Jones***, 703 F.2d 473 (10th Cir. 1983) (Service had obtained judgment against taxpayers and sought financial information from them; privilege claim upheld because answers might be link in chain of evidence for attempt to evade payment prosecution under Section 7201).

The Grants were entitled to assert their Fifth Amendment right in the instant proceedings. One's right to counsel in a civil contempt proceeding where one invokes the Fifth Amendment right against self-incrimination is essential. The District Court's failure to appoint counsel denied the Grants due process and renders the order of contempt void.

The Government also failed to establish, by any evidence at the enforcement hearing, the existence of any records or that the Grants are even obligated to keep said records. Any bald assertion of a revenue agent is insufficient to establish the existence of the summoned records.

> [A] conclusory statement is not enough. We must assume, therefore, that their existence was still an open matter at the time of the contempt hearing. It follows that anything appellant were to say would add to the sum total of the government's case against him, which is the threshold showing of potential incrimination. ***United States v. Edgerton***, 734 F.2d 913, 921 and n. 9 (2d Cir. 1984).

The nonexistence of the summoned records is equivalent to the defense of one's inability to comply with the District Court's enforcement order. The Grants are entitled to show that they were excused from complying. ***Mercer v. Mitchell***, 908 F.2d 763, 768 (11th Cir. 1990). The civil contempt statute on recalcitrant witnesses which the Grants fall under specifically states the court can hold someone in contempt "whenever a witness ... refuses ***without just cause shown*** to comply with an order of the court to testify or provide other information." 28 U.S.C. Section 1826(a).

The District Court has repeatedly refused to recognize the Grants' right to the Fifth Amendment claim against self-incrimination. This is the "just cause" which the Court refused to accept or to allow the Grants to show at the contempt hearing. Therefore, the Court, in effect, has precluded the Grants' Fifth Amendment right against self-incrimination throughout the entirety of these proceedings.

The Bill of Rights was intended to place a limit on the use of Government force. George Washington stated that: "Government is not reason, it is not eloquence--it is force. Like fire it is a dangerous servant and a fearful master; never for a moment should it be left to irresponsible action." Likewise, Woodrow Wilson, in his book, ***The State***, explained what is government: "Government, in its last analysis, is organized force." In essence, it is a series of edicts backed by a constabulary--a physical force. Obey, or take the consequences!

Our Founding Fathers intended the Bill of Rights to be enforced by the Judicial Branch and limit Government force and compulsion. Our matchless Constitution and the Bill of Rights limited organized force--government--more severely than ever before in all history. Governmental force can be symbolized by the clenched fist. Find out what the fist can and cannot do and you will know what government should and should not do, not necessarily what it will and will not do. It should be obvious what the fist can do--it can inhibit, restrain, prohibit, and penalize.

Our Constitution and the Bill of Rights were intended to draw the line between what Government should and should not do. Regardless of the miserable historical record of governments overstepping their bounds, as in the instant matter, limited government is an absolute necessity if liberty is to prevail in our nation. Liberty is impossible ***with*** unlimited government. It is abundantly clear that unlimited government is tyranny: Absolute power arbitrarily administered. The administrators of tyranny are tyrants. What is a tyrant? S.C. Champion has brilliantly defined the tyrant as "only the slave turned inside out." What is a slave? According to the dictionary, a slave is "a human being who is (1) absolutely subject to another human being," and (2) "a person who

is completely dominated by some influence, habit."

Liberty is impossible short of an understanding of what it is, impossible ***without*** limited government, and impossible ***with*** unlimited government. The Ninth Circuit panel's decision in the instant case is the antithesis for what our nation has stood. The panel's decision failed to apply the proper ***de novo*** standard of review in a transparent attempt to deny the Grants their constitutional rights under the Fifth and Sixth Amendments. The panel's decision is in direct conflict with the Ninth Circuit's and Supreme Court's previously cited precedents.

CONCLUSION

The important federal questions presented here, which the Ninth Circuit decided in conflict with its own precedents and applicable decisions of this Court, is whether an order of contempt is void, due to the trial court's failure to afford the petitioners their Fifth and Sixth Amendment rights, and actionable under Rule 60(b)(4). The importance of these questions require that this Court grant the requested writ.

WHEREFORE petitioners request that this Court grant their Petition for a Writ of Certiorari to review and reverse the decision of the Ninth Circuit and remand for litigation petitioners' Fifth Amendment claim with the assistance of counsel as mandated by the Sixth Amendment.

Respectfully submitted,

M. LESLIE GRANT
ALICE M. GRANT
% 2702 Cuesta Road
Santa Barbara, CA 93105
(805) 687-9771

M. Leslie Grant
Alice M. Grant

Appellants Pro Per

APPENDIX

APPENDIX A - 1

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 91-4456 JGD(Tx)
Case No. CV 91-4457 JGD(Tx)

UNITED STATES OF AMERICA,

Petitioner,

v.

MORTIMER LESLIE GRANT; ALICE M. GRANT,

Respondents.

ORDER GRANTING UNITED STATES' MOTION TO HOLD RESPONDENT IN CIVIL CONTEMPT AND ORDER GRANTING COSTS AND ATTORNEYS' FEES

The above case came on for hearing before the Honorable John G. Davies, United States District Judge, on September 14, 1992, upon a continued hearing noticed by petitioner United States of America by filing of its second Notice of Motion and Motion To Hold Respondent[s] In Civil Contempt And For Costs And Attorneys' Fees.

[M. Leslie Grant and] Alice M. Grant appeared pro se. Sandra R. Brown, Assistant United States Attorney, appeared for the United States of America.

The Court has reviewed and considered the parties' pleadings, and oral argument, and all other matters properly part of the record. Based upon this review, the Court HEREBY GRANTS petitioner's motion to hold respondent in civil contempt

and for costs and attorneys' fees.

UNDERLYING FACTS

On July 24, 1991, Alice M. Grant was served with an Internal Revenue Service Summons requesting the production of any and all bookkeeping records used to record income and expenses of respondent's business from January 1, 1975 through and including December 31, 1989, including but not limited to: sales invoices, billing statements, account receivables, client ledger cards, payment records, cash receipt journals, daily registers, financial statements, general ledgers, subsidiary ledger accounts, recapitalization schedules, workpapers, bookkeeping records, financial statements re: the purchase and sale of stocks, bonds, options, securities and precious metals, and all documents relating to investments in the following: (a) Santa Barbara Highlands; (b) National Resources; (c) Pismo Ventures; (d) Montecielo; and (e) Sherwood Apartments, so that the Internal Revenue Service can determine respondent's federal tax liabilities for those same years, for which she has failed to file federal income tax returns. [Mr. and] Mrs. Grant failed to comply with the subject summons.

On October 28, 1991, at a hearing to show cause why respondent[s] [M Leslie and] Alice M. Grant should not be compelled to comply with the subject summons, the Court ordered respondent[s] to appear before Revenue Agent Edward Finley, on November 19, 1991, at 9:00 a.m., at the offices of the Internal Revenue Service, 25000 Financial Square, Room 205, Oxnard, California, and at that time comply with the subject summons. The order of the Court to this effect was filed on October 31, 1991.

On November 19, 1991, respondent[s] appeared, but failed to produce any documents as ordered by this Court.

On April 29, 1992, upon the United States' initial Motion To Hold Respondent In Civil Contempt, and upon respondent[s'] promise to make a good faith effort to comply with the IRS' summons on or before June 1, 1992, before Revenue Agent Finley,

at the IRS' offices located at 1332 Anacapa Street, Ste 101, Santa Barbara, California, this Court issued a second Order requiring respondent[s] to comply with the underlying IRS' summons.

On May 29, 1992, respondent[s] appeared, but failed to produce any documents as ordered by this Court.

DISCUSSION

The Ninth Circuit has held that a district court may hold in civil contempt any person who willfully disobeys a specific and definite order of the court. ***Shuffler v. Heritage Bank***, 720 F.2d 1146 (9th Cir. 1983); Rule 70 of the Federal Rules of Civil Procedure. A person fails to act as ordered by the court when he fails to take all reasonable steps within his power to comply with the court's order. ***Shuffler v. Heritage Bank***, ***supra***, 720 F.2d at 1146-7. Respondent[s] in this matter ha[ve] failed to take all reasonable steps within [their] power to comply with this Court's Orders. Based upon the record, respondent[s] ha[ve] set forth no evidence in support of [their] burden of showing why [they] should not be held in civil contempt for failing to comply with this Court's Orders. Respondent[s'] sole defense rests upon allegations that this Court does not have proper jurisdiction to hear and adjudicate the issue of civil contempt for failure to comply with its Order pending the outcome of an appeal of that Order. This assertion is incorrect. This Court has jurisdiction and the power to enforce its Orders by civil contempt proceedings where no stay of the pending appeal, of the underlying order, has been granted. ***See McComb v. Jacksonville Paper Co.***, 336 U.S. 187, 69 S.Ct. 497, 93 L.Ed. 599 (1949); ***Masalosalo v. Stonewall Inc. Co.***, 718 F.2d 955 (9th Cir. 1983); ***In re Thorp***, 655 F.2d 997 (9th Cir. 1981).

Finally, 18 U.S.C. Section 401(3) provides that "[a] court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as *** [d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command." ***See also***, 26 U.S.C.

Section 7604(b); Rule 70, Federal Rules of Civil Procedure.

CONCLUSION

For the above reasons, the Court HEREBY GRANTS petitioner's motion to hold respondent[s] in civil contempt, and awards the United States of America its costs and attorneys' fees in the amount of $500.00, payable upon entry of this order.

IT FURTHER ORDERED that respondent[s] pay the sum of $150.00 per day [each], payable to the United States, until [they] purge[] [themselves] of [their] contempt and appear[] before Revenue Agent Finley, at the offices of the IRS' located at 1332 Anacapa Street, Ste 101, Santa Barbara, California, and fully complies with the Court's order enforcing the Internal Revenue Service summons. To the extent of the civil contempt sanctions in the amount of $150.00 per day [each], the Court stays this Order for 10 days from the date of entry of this Order, so that respondent[s] may comply with the Court's Order Enforcing IRS Summons and purge [themselves] of civil contempt. However, should respondent[s] fail to comply with the Court's order upon the expiration of ten days from the date of entry of this Order, the stay on this order shall be automatically released and the $150.00, per day fine shall take effect immediately, and be in effect until such time as respondent[s] fully compl[y] with the Court's order enforcing the subject Internal Revenue Service Summons.

IT IS SO ORDERED.

DATED: September 24, 1992.

JOHN G. DAVIES
UNITED STATES DISTRICT JUDGE

APPENDIX A - 5

Presented By:

TERREE A. BOWERS
United States Attorney
MASON C. LEWIS
Assistant United States Attorney
Chief, Tax Division

SANDRA R. BROWN
Assistant United States Attorney

Attorneys for the United States
of America

APPENDIX B - 1

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 91-4456 JGD(Tx)
Case No. CV 91-4457 JGD(Tx)

UNITED STATES OF AMERICA,
Petitioner,
v.
MORTIMER LESLIE GRANT; ALICE M. GRANT,
Respondents.

ORDER DENYING RESPONDENTS' MOTION TO ALTER, AMEND OR VACATE JUDGMENT, OR IN THE ALTERNATIVE, TO PURGE RESPONDENTS OF CONTEMPT

On June 27, 1994, the Respondents' Motion to Alter, Amend or Vacate Judgment, or, in the Alternative, to Purge Respondents of Contempt came on before the Court for hearing. After reviewing the written and oral submission of the parties, the motion is hereby DENIED.

FACTS

On August 19, 1991, the United States filed petitions to enforce summonses of the Internal Revenue Service ("IRS"). The petitions alleged that Mortimer L. and Alice M. Grant ("the Grants") had failed to produce requested records and to testify in response to the summonses issued to them. The Court enforced the summonses, ordering the Grants to appear with the summoned documents at the IRS offices in Oxnard, California on November 19, 1991.

The Grants filed a notice of appeal on November 14, 1991.

On November 19, 1991, the Ninth Circuit denied their emergency motion for a stay pending appeal. The Grants appeared at the prescribed location on November 19, 1991, but failed to produce any documents.

On May 19, 1992, the United States filed motions to hold the Grants in civil contempt. At the hearing on those motions, the Court informed the Grants that it had jurisdiction over the contempt proceedings, and warned them that they would be subject to incarceration for failure to comply with the Court's order. The Grants agreed to comply with the IRS summonses before June 1, 1992 and, based on this representation, the Court declined to hold them in contempt. However, the Grants did not comply.

The United States again filed motions to hold the Grants in civil contempt. The motions were heard on September 14, 1992, and granted in orders filed on September 24. Ex. C. to Government's Opposition. The Court ordered the Grants to pay the United States $500 in costs and attorneys' fees and $150 per person per day, until they fully complied with the order enforcing the summonses.

On February 10, 1993, the Ninth Circuit upheld the Court's enforcement of the summonses in an unpublished order. Ex. C. to Government's Opposition. On February 11, 1994, the Ninth Circuit upheld the Court's contempt orders in a second unpublished order. Ex. A to Government's Opposition.

Whether the Grants have obeyed the Court's orders is unclear. In March 1993, based on their continued non-compliance, the Court issued judgments against the Grants in the amount of $22,700.00 each for the period from September 24, 1992 to February 18, 1993.

DISCUSSION

Pursuant to Federal Rule of Civil Procedure 60(b), the Grants now move to "alter, amend or vacate" the contempt orders filed by the Court on September 24, 1992. The Grants contend

that the Court's contempt order violated their Fifth Amendment privilege against self-incrimination and that the government lacked standing to seek contempt for the exercise of Fifth Amendment rights. Further, the Grants assert that the Court should have appointed them counsel under the Sixth Amendment.

The Court has jurisdiction to consider this motion. Leave of the appellate court is not necessary to reopen a case that has been reviewed on appeal. ***Standard Oil Co. of California v. United States***, 429 U.S. 17 (1976). The cases cited by the government to the contrary pre-date ***Standard Oil***.

A. The Standard

Federal Rule of Procedure 60(b) provides:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment ... for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged ... (6) or any other reason justifying relief from operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3), not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or ... to set aside a judgment for fraud upon the court.

B. Analysis

The Grants contend that even if subdivisions (1), (2) and (3) of Rule 60(b) are time-barred, they are entitled to relief from the Court's order of September 24, 1992 under subdivisions (4), (6) and the unnumbered provision of Rule 60(b) pertaining to fraud upon the Court. Reply at 3-4.

The Grants do not elaborate on the charge in their reply brief that the Court's order was void or that the government perpetrated a fraud upon the Court. The Court discerns no factual basis for these arguments.

The Grants misconstrue Rule 60(b)(6). It is available for reasons other than those listed in the preceding five clauses of the rule. ***Pioneer Investment Services Co. v. Brunswick Assocs. Ltd. Partnership***, 113 S.Ct. 1489, 1497 (1993); ***Liljeberg v. Health Services Acquisition Corp.***, 486 U.S. 847, 863 n. 11 (1988). Thus, if a party is partly to blame for the delay in bringing matters to the court's attention, relief must be sought under Rule 60(b)(1) and the party's neglect must be "excusable." ***Pioneer Investment***, 113 S.Ct. at 1497.

In this case, the Grants are responsible for failing to raise their Fifth and Sixth Amendment arguments during the summons enforcement and contempt proceedings. Thus, to obtain relief under Rule 60(b), they must operate under subsection (b)(1), which contains the one-year limitation period. The Grants filed the instant motion on or about June 1, 1994, more than twenty months after the Court's orders of September 24, 1992. Thus, their new constitutional arguments are time-barred.

Even if the Grants could bring their motion under Rule 60(b)(6), the Court finds that they have not acted "within a reasonable time" and their motion also fails on this basis.

For these reasons, the Grants' motion is DENIED.

IT IS SO ORDERED.

DATED: June 29, 1994.

JOHN G. DAVIES
UNITED STATES DISTRICT JUDGE

APPENDIX C - 1

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-56142
D.C. No. CV-91-04456-JGD(Tx)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ALICE M. GRANT; MORTIMER LESLIE GRANT,
Defendants-Appellants.

No. 94-56144
D.C. No. CV-91-04457-JGD(Tx)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
MORTIMER LESLIE GRANT; ALICE M. GRANT,
Defendants-Appellants.

MEMORANDUM

Appeal from the United States District Court
for the Central District of California
John G. Davies, District Judge, Presiding

APPENDIX C - 2

Submitted March 7, 1995*

Before: SNEED, POOLE, and BRUNETTI, Circuit Judges.

In this consolidated case, Mortimer and Alice Grant appeal pro se the district court's denial of their Fed. R. Civ. P. 60(b)(1) motions. We have jurisdiction pursuant to 28 U.S.C. Section 1291, and we affirm.

The Grants sought to "alter, amend or vacate" the district court's prior contempt orders against them or "to purge respondents of contempt." The district court had found the Grants in contempt for failing to comply with summonses issued by the Internal Revenue Service ("IRS"). The IRS issued the summonses in an effort to obtain records relating to the Grants' federal income tax liability from January 1, 1975, through and including December 31, 1989. The district court concluded that the only provision the Grants could have relied on in bringing their motions was Fed. R. Civ. P. 60(b)(1), but found that the Grants' motions were time-barred because they were filed more than twenty months after issuance of the court's contempt orders.

The Grants contend that the district court erred in construing their motions under Rule 60(b)(1) and determining that the motions were time-barred. This contention lacks merit.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Accordingly, the Grants' request for oral argument, made in their opening brief, is denied. Fed. R. App. P. 34(a), 9th Cir. R. 34-4.

We review the denial of a Rule 60(b) motion for abuse of discretion. ***Molloy v. Wilson***, 878 F.2d 313, 315 (9th Cir. 1989). "An appeal from the denial of a Rule 60(b) motion brings up only the denial of the motion for review, not the merits of the underlying judgment." ***Floyd v. Laws***, 929 F.2d 1390, 1400 (9th Cir. 1991).

The Grants argue that the district court should have construed their motions as being brought under Rule 60(b)(4) and that their motions were timely since they were filed within a "reasonable" time. We disagree. Rule 60(b)(4) allows a court to relieve a party from a final judgment if the judgment is void. A judgment is void for the purposes of Rule 60(b)(4) only if the court that rendered the judgment was without jursidiction or acted in a manner inconsistent with due process. ***Owens-Corning Fiberglas Corp. v. Center Wholesale, Inc. (In re Center Wholesale, Inc.)***, 759 F.2d 1440, 1448 (9th Cir. 1985). "A judgment is not void merely because it is erroneous." ***Id.*** The Grants fail to show that the district court's orders finding them in civil contempt were void. In fact, this court has already upheld the validity of the district court's contempt orders. ***United States v. Grant***, No. 92-56230, unpublished memorandum decision (9th Cir. Feb. 11, 1994).

Because the Grants were partly to blame for the delay in bringing their motions, the district court correctly construed the Grants' motions as being brought under Rule 60(b)(1). See ***Pioneer Inv. Services Co. v. Brunswick Assocs. Ltd.***, 113 S.Ct. 1489, 1497 (1993) ("if a party is partly to blame for the delay, relief must be sought within one year under subsection (1) and the party's neglect must be excusable.").

Rule 60(b)(1) permits relief from a judgment in circumstances of "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1). Motions filed under Rule 60(b)(1) must be filed "not more than one year after the judgment, order, or proceeding was entered." ***See*** Fed. R. Civ. P. 60(b). Since the Grants' Rule 60(b)(1) motions were filed

more than twenty months after the entry of the contempt orders, the district court did not err in denying the motions as time-barred. Fed. R. Civ. P. 60(b); ***Ashford v. Steuart***, 657 F.2d 1053, 1055 (9th Cir. 1981) (per curiam).

AFFIRMED.[1] DATED: March 9, 1995.

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[1] Because the Grants' motions were untimely, we need not address the Grants' other arguments addressing the merits of their motions.

APPENDIX D - 1

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-56142
D.C. No. CV-91-04456-JGD(Tx)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ALICE M. GRANT; MORTIMER LESLIE GRANT,
Defendants-Appellants.

No. 94-56144
D.C. No. CV-91-04457-JGD(Tx)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
MORTIMER LESLIE GRANT; ALICE M. GRANT,
Defendants-Appellants.

ORDER

Before: SNEED, POOLE, and BRUNETTI, Circuit Judges.

The panel has voted to deny appellants' petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

DATED: June 2, 1995.

APPENDIX E - 1

FEDERAL RULE OF PROCEDURE 60(b).

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3), not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., [Section] 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

APPENDIX E - 2

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

APPENDIX E - 3

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence.